

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

GROSS-QUATRONE, .  
Plaintiff, .  
vs. . Case No. 17-cv-13111  
MIZDOL, et al., . Newark, New Jersey  
Defendants. . January 21, 2022  
.

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE LEDA DUNN WETTRE  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES (the parties appeared via Zoom videoconference):

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1 | (Commencement of proceedings)

2 |  
3 | THE COURT: Good morning. We're on the record in  
4 | Deborah Gross-Quatrone versus Bonnie Mizdol, et al., Civil  
5 | Action Number 17-13111. I'm Magistrate Judge Wettre here to  
6 | hear oral argument that was noticed on defendants' motion to  
7 | compel an independent medical examination of the plaintiff.

8 | So may I have appearances, please, starting with  
9 | plaintiff's counsel.

10 | MR. DWYER: Good morning, Your Honor. Andrew Dwyer  
11 | of the Dwyer Law Firm, appearing for the plaintiffs.

12 | THE COURT: Good morning.

13 | MS. DOHN: Good morning, Your Honor. Kathleen Dohn  
14 | from the law firm of Brown & Connery on behalf of the  
15 | defendants.

16 | THE COURT: Good morning.

17 | So it's defendants' motion, and so I'll hear you  
18 | first, Ms. Dohn.

19 | MS. DOHN: Thanks.

20 | Your Honor, I know that you've been through all the  
21 | moving papers and all the exhibits. So what I don't intend  
22 | to do today is to go through chapter and verse.

23 | So what I would like to focus on is the inquiry  
24 | that Your Honor had raised as to whether or not this motion  
25 | is now rendered moot by the representations that were made by

1 Mr. Dwyer.

2 And respectfully, Your Honor, I don't believe it  
3 has. And the reason why is that if you look at the string of  
4 cases that were cited by both parties --

5 THE COURT: Can I stop you for a second, Ms. Dohn.

6 MS. DOHN: Sure.

7 THE COURT: Just to tell you where I am on that, I  
8 just wasn't clear if the parties had reached an accord.  
9 That's why we issued that order.

10 I accept that they haven't. And so if the parties  
11 stipulate to something that obviates the motion, that's  
12 completely up to them. I am not going to do that by  
13 representations that were made in briefs. It would have to  
14 be presented to me as a stip- -- a binding stipulation.

15 So I'm in the land of Rule 35 and the Third  
16 Circuit's instruction on it. So you don't really have to  
17 defend as -- you know, whether you've reached some kind of  
18 informal accord. I'm assuming that you haven't.

19 But go ahead.

20 MS. DOHN: -- absolutely.

21 But I think it's instructive, because I think where  
22 we are right now is why should there be an IME compelled if  
23 the plaintiff is saying that I am no longer -- I am not going  
24 to testify that there's ongoing distress, and I don't intend  
25 to call a physician as an expert. So that's where it's kind

1 of the lay of the land that we have now.

2 And I'll say that the -- the representation that  
3 she's not going to claim any ongoing distress is  
4 contradictory to her deposition testimony. And I think if  
5 Your Honor looks through -- and I know you have -- has  
6 reviewed --

7 THE COURT: Can I ask you something too, just to  
8 clarify that? Even taking at face value that she's not  
9 claiming any ongoing distress, there's been a couple of years  
10 since the conduct complained of in the complaint. So there's  
11 a good chunk of time for which she could still claim  
12 emotional distress, to my understanding.

13 MS. DOHN: Right. And I think the problem that we  
14 have right now is there's a lack of clarity as to that,  
15 because the deposition testimony has, to a certain extent,  
16 been walked back.

17 Reviewing all the cases that are cited Your Honor  
18 in which they -- where IMEs have been either granted or  
19 denied, I think the common thread among them is in the cases  
20 where an IME or request for an IME has been denied is there  
21 have been clear parameters as to what the testimony is going  
22 to be.

23 And in reviewing those cases, it was a plaintiff  
24 that was not alleging severe emotional or physical harm  
25 requiring psychiatric care. They did not seek to support

1     their claims with testimony or records of psychiatric or  
2     medical personnel. Counsel for plaintiff expressly  
3     represented they would not introduce evidence that  
4     defendants' conduct caused or exasperated [sic] -- condition,  
5     and there were no allegations of ongoing emotional distress.

6                   And that's simply not the case that we have here.  
7     We have a plaintiff who had testified that the emotional  
8     distress that she experienced at the hands of these  
9     defendants, allegedly, was continuing to present and would  
10    forever be with her. We have answers to interrogatories in  
11    which she specifically cites that she treated with 21 medical  
12    providers, including a psychiatrist and a neuropsychologist  
13    for emotional distress that she attributed to these specific  
14    defendants. One of those providers, Dr. Acquaviva has  
15    diagnosed her with depression as well as anxiety. And there  
16    is no history of depression.

17                  So a jury is left with the testimony that I can  
18    only gather would be that I experienced all these alleged  
19    discrimination at the hands of the defendants in this case.  
20    I sought medical treatment by a psychiatrist, and he  
21    diagnosed me with these.

22                  That goes well beyond garden variety. And her  
23    testimony that it was ongoing goes well beyond garden variety  
24    as well.

25                  And there's a lack of clarity --

1                   THE COURT: Well, "garden variety" isn't used  
2 either by the Rule 35 or the Third Circuit. Their term is  
3 "severe emotional distress." So I don't know what "garden  
4 variety" means. It has no -- as far as I know, it has no  
5 objective definition. So it's not -- I know parties bandy it  
6 about, but it's not very useful to me.

7                   MS. DOHN: Absolutely.

8                   And I think -- but I think what the parameters is  
9 that severe emotional distress is emotional distress for  
10 which you seek medical treatment for, that you have medical  
11 diagnoses for, and that goes beyond, I'm sad, I'm upset, I  
12 felt bad about this.

13                  And that's what we have here. She's alleging that  
14 there's exasperation [sic] of physical clinical conditions.  
15 And I just want to touch upon a couple of the cases, because  
16 I think -- I think are instructive.

17                  First, I wanted to lead with Benham v. Rice because  
18 I understand that that was a point of -- in opposition. And  
19 obviously the magistrate judge's ruling was overruled by the  
20 district court in that analysis.

21                  However, I think the judge's analysis by the  
22 district court actually buttresses our claims here for an  
23 IME, because in saying that an IME wasn't warranted in that  
24 case, the district court said Benham does not seek damages  
25 for severe emotional or physical harm requiring psychiatric

1 care in the past or present, and she does not seek to support  
2 her claim with the testimony or records of any psychiatric or  
3 medical personnel.

4 What a difference from what we have here. What we  
5 have here is a plaintiff who is going to testify as to her  
6 emotional distress, that she sought treatment with  
7 Dr. Acquaviva, and Dr. Acquaviva diagnosed her with these  
8 specific diagnoses. And it's unclear what the time  
9 parameters are going to be, because we have medical records  
10 as late as October of 2020 from her psychiatric care  
11 professional, Dr. Acquaviva, that discuss Judge Misdol, who's  
12 a defendant in this matter.

13 So it's unclear to me what those time parameters  
14 are going to be, since we're now walking back the deposition  
15 testimony of the plaintiff.

16 Here, she pled in her amended complaint and her  
17 answers to interrogatories, she testified at her deposition  
18 about the severe emotional distress that manifested itself in  
19 physical harm and exasperated clinical conditions.

20 And that, I think, is a key distinction. I know  
21 the plaintiff relies heavily upon Conforti. And that's one  
22 of the key distinctions that I think we have here that  
23 differs from the plaintiff in Conforti. But that plaintiff  
24 expressly represented that he would not introduce evidence  
25 that defendants kind of caused or exasperated any clinical

1 conditions.

2 We don't have any such representation that I'm  
3 aware of to the Court. Mr. Dwyer will certainly, you know,  
4 apprise the Court if I'm incorrect in that regard. But my  
5 understanding of the testimony and my understanding of  
6 everything that's been produced in discovery thus far is that  
7 any testimony should -- from a trial would be that she  
8 suffered such emotional distress that it exasperated clinical  
9 conditions such as her thyroid conditions, her Hashimoto. It  
10 was so severe that it required surgical intervention because  
11 of the nose bleeds that she was suffering that she attributed  
12 to the emotional distress caused by the defendants in this  
13 matter.

14 It's hard for me to understand or comprehend --

15 THE COURT: Are you saying that the -- if she  
16 sought damages for physical conditions, it would necessarily  
17 be physical conditions that were a physical manifestation of  
18 emotional distress?

19 MS. DOHN: Absolutely, yes.

20 THE COURT: She's not alleging that, you know,  
21 anyone -- any of the defendants physically directly harmed  
22 her, pushed her or the like.

23 MS. DOHN: Absolute- --

24 THE COURT: So the physical would have to come --  
25 the physical conditions for which she seeks damages would

1 have to be manifestations of emotional distress.

2 Is that the defendants' position?

3 MS. DOHN: That's exactly -- that's exactly it,  
4 Your Honor. This isn't the case where she's alleging one of  
5 the defendants punched her in the nose, and as a result of  
6 that, she's required surgery.

7 She's saying that I suffered such emotional  
8 distress that it manifested itself in these physical, you  
9 know -- in this physical representations, and that included  
10 exasperating clinical conditions. I think that's a -- I  
11 think that's clear-cut severe emotional distress. It's hard  
12 for me to see otherwise.

13 And I think the case law bears that out.

14 THE COURT: Okay. Anything else?

15 MS. DOHN: No, Your Honor, unless you have any  
16 questions.

17 THE COURT: Not so far.

18 Okay.

19 Mr. Dwyer, your turn.

20 MR. DWYER: Thank you, Your Honor.

21 There are actually two issues under Rule 35, and  
22 Ms. Dohn only touched on the first one, the "in controversy"  
23 requirement. The second requirement, which is a good cause  
24 requirement, she didn't really mention that at all. I'm  
25 going to address both requirements, because both requirements

1 are lacking here, but if either one is lacking, the Rule 35  
2 motion has to be denied.

3 Now, as far as the Third Circuit law goes, the  
4 leading Third Circuit case, the District of New Jersey, is  
5 the Bowen case. We also cited Judge Waldor's case --  
6 decision --

7 THE COURT: Well, the Kuminka case was the Third  
8 Circuit case. Right?

9 MR. DWYER: Yeah --

10 THE COURT: Bowen was a district court, and it was  
11 this district court. So it would be a judge of like stature.  
12 The binding precedent is the Third Circuit in Kuminka.  
13 Right?

14 MR. DWYER: And Bowen is consistent with that.

15 And defense counsel has not cited any case that  
16 contradicts Bowen. And they have not cited any case that  
17 contradicts Judge Waldor's decision in the Conforti case.  
18 And as we pointed out in our surreply that Your Honor  
19 permitted us to file, when they attempted to cite cases not  
20 from this jurisdiction, it turned out to -- cases weren't  
21 good law. She cited cases overturned, it was reversed by the  
22 district court judge. And she cited another case that has  
23 been expressly disavowed in the District of Columbia  
24 district.

25 So the defense has failed to cite any cases that

1 distinguishes Conforti or Bowen or any of the other cases  
2 that we cited.

3 Now with regard to the "in controversy"  
4 requirement, Ms. Dohn keeps emphasizing this idea of ongoing.  
5 That's not what the case law says. And in fact, Conforti  
6 addressed that issue head on and rejected what Ms. Dohn is  
7 saying. Conforti explicitly said that even when there is  
8 ongoing -- and I'm quoting here -- ongoing mental distress,  
9 that does not expose the plaintiff to a Rule 35 exam unless  
10 it is specific psychiatric condition or unusually severe.  
11 I'm quoting here, Judge. Quoting --

12 THE COURT: Can I ask you a question on that that  
13 relates to -- I mean, it's a very fact-sensitive analysis,  
14 and I have a lot facts before me in this case.

15 So on the point -- interpretation of what it means  
16 to be -- 35, one of the criteria that can satisfy in  
17 controversy is that the plaintiff is making an allegation of  
18 a specific mental or psychiatric injury or disorder.

19 Now, Ms. Dohn provided Dr. Acquaviva, her treating  
20 psychiatrist records in which he does make a specific  
21 diagnosis.

22 So why wouldn't that be enough to demonstrate her  
23 condition is in controversy?

24 MR. DWYER: So, Your Honor, you broke up quite a  
25 bit on that question.

1                   THE COURT: Oh, I'm sorry.

2                   MR. DWYER: I couldn't quite catch everything, but  
3 I think I've got the gist of it, so I'll do my best --

4                   (Simultaneous conversation)

5                   THE COURT: Let me repeat it for you. Okay?

6                   And tell me -- just raise your hand if I start  
7 breaking up. I apologize. The Internet is not always great  
8 from here.

9                   So what I said was Rule 35 just provides that a  
10 condition has to be in controversy and some other criteria  
11 about the -- you know, specifying the conditions of the  
12 examination.

13                   And then the Kuminka case by the Third Circuit  
14 gives five criteria, any one of which may be met to show that  
15 a condition's in controversy.

16                   So one of them that the State is claim -- or not  
17 the State, but the defendants are claiming here is that the  
18 plaintiff is making an allegation of a specific mental or  
19 psychiatric injury or disorder.

20                   And I did review her treating psychiatrist,  
21 Dr. Acquaviva's records, and he, as I understand it, will be  
22 a trial witness. And he gives a diagnosis of major  
23 depressive disorder and generalized anxiety, which seems to  
24 me to constitute an allegation of a specific mental or  
25 psychiatric injury or disorder.

1                   And so why is that criterion of being in  
2 controversy not met on this record?

3                   MR. DWYER: Sure. Thank you, Judge.

4                   I think I understood the gist of what you're  
5 asking. And so the point of departure, I think, here for me  
6 is that I don't agree that there has to be a stipulation in  
7 between the parties to shape the relevant motion record.  
8 That, in fact, what the case law that we cited says is that a  
9 party, regardless what it says in its pleading or anywhere  
10 else, can state that it's not seeking damages and will not  
11 seek damages at trial for a specific psychiatric condition.

12                  And we have stated that very clearly. We will not  
13 be seeking damages at trial for a specific psychiatric  
14 condition. We will not --

15                  (Simultaneous conversation)

16                  THE COURT: But will you -- when I've seen this --  
17 and I know you're a very experienced attorney, given the  
18 busyness of our district. I've had hundreds, if not  
19 thousands, of employment cases where the plaintiff is seeking  
20 damages for emotional distress. And the many instances in  
21 which this has come up, this very situation about the  
22 plaintiff saying, "Well, gee, it doesn't qualify for an IME  
23 to be taken. It's garden variety and so forth." When  
24 there's a question, the way I've seen counsel answer that  
25 question and obviate an IME is to say the plaintiff will not

1 be seeking damages for emotional distress or physical  
2 manifestation thereof.

3 I have not seen that in the briefs. So if -- and  
4 also, I am not going to say that parties are bound by what  
5 they put in the briefs. I don't know what's going to happen  
6 at trial. At trial, the parties may say, "Well, that was our  
7 position then. We -- it wasn't accepted. It went off the  
8 table. It never became part of our agreement at trial."

9 So I'll leave it to -- I'll leave it to counsel. I  
10 am not going to go on any informal offers in papers. If you  
11 all want to stipulate to obviate the need to take an IME, you  
12 know how to do it. I've seen it done countless times before.  
13 But short of that, I don't know what to do with the  
14 representations about what might or might not be argued at  
15 trial.

16 MR. DWYER: So can I respond to what Your Honor --

17 THE COURT: Yes, please.

18 MR. DWYER: Okay. Thank you.

19 So first of all, I don't think that's consistent  
20 with the case law. The case law does not require a  
21 stipulation. The courts recognize that the plaintiff is the  
22 master of her own claims, and the plaintiff can simply state,  
23 "We're not asserting that claim. And we're not asserting  
24 damages for a specific psychiatric condition."

25 I'd also respectfully disagree with your Your Honor

1 that there is any case law that says that if the plaintiff  
2 claims any physical manifestations at all, that requires an  
3 IME. I don't believe there's any legal authority for that  
4 whatsoever.

5 THE COURT: I didn't -- but I didn't intend to say  
6 that if you interpreted that.

7 MR. DWYER: Okay.

8 Well, but -- so when Your Honor says, since there's  
9 physical manifestations alleged here, that does not equal an  
10 IME. So what the case law says is you either have a specific  
11 psychiatric condition, which we're disavowing, or unusually  
12 severe emotional distress.

13 And what I was zeroing in on with the ongoing point  
14 is that it's simply not true that because the emotional  
15 distress is ongoing, that that automatically makes it ripe  
16 for an IME. That was specifically rejected by the court in  
17 the Conforti case and in other cases that we've cited, and  
18 Ms. Dohn doesn't cite any case law to the contrary. The  
19 Third Circuit has never said such a thing.

20 So, you know, Ms. Dohn says, "Well, the plaintiff  
21 in Conforti and in Bowen said that they would never present  
22 any testimony about psychological counseling." That's not  
23 true. That's absolutely false.

24 The plaintiff in Conforti clearly was going to  
25 present evidence of having sought psychological counseling

1 and also of having obtained medication, and, yet, Judge  
2 Waldor found that was not a sufficient ground to place the  
3 plaintiff's mental condition in controversy to warrant an  
4 IME.

5 It's also not true, as Ms. Dohn kept suggesting to  
6 Your Honor over and over and over again, that any allegation  
7 that the defendants' actions exacerbated the plaintiff's  
8 emotional distress leads to an IME. The plaintiff in  
9 Conforti -- the plaintiff's treatment provider in Conforti  
10 was a fact witness -- was offered as a fact witness,  
11 specifically testified -- and it's even quoted in the  
12 Conforti decision that the defendants' conduct exacerbated  
13 the emotional distress of the plaintiff. But that didn't  
14 warrant an IME. That didn't put the mental condition at  
15 issue because the plaintiff still wasn't alleging or seeking  
16 damages for any kind of specific psychiatric conditions.

17 And if I may, on just one point on that, Judge,  
18 which is that there is a difference in the way certain terms  
19 are used. And that's why we quoted at length from the  
20 plaintiff's deposition -- and we provided it to you as well  
21 so you could see it for yourself. It's one thing for  
22 somebody to say, you know, this makes me very anxious and  
23 another thing for somebody to say you suffer from an anxiety  
24 disorder. We're not seeking any damages whatsoever in this  
25 case, based on any kind of allegation that the defendants

1 have caused the plaintiff to suffer an anxiety disorder.

2 When plaintiff was asked about --

3 THE COURT: Mr. Dwyer, let me just -- I wanted to  
4 clarify something.

5 So Dr. Acquaviva is going to testify at trial, as  
6 things stand now. Dr. Acquaviva's speciality, as I  
7 understand it, is psychiatry. And he's treated the  
8 plaintiff. So if he takes the stand, it's not because he has  
9 personal knowledge of what occurred in the workplace. He's  
10 obviously testifying based upon his treatment of the  
11 plaintiff and what he's gleaned of her psychiatric condition  
12 as it relates to her employment.

13 So whether you say you're seeking damages for a  
14 specific injury or not, the jury may award compensatory  
15 damages, and we all know that a jury has a rather free hand  
16 on setting how much to award in compensatory damages.

17 Couldn't they rely on Dr. Acquaviva's testimony to  
18 conclude that she suffered, in their eyes, severe emotional  
19 distress and to award her damages accordingly?

20 MR. DWYER: Yeah, they could award damages based on  
21 Dr. Acquaviva's testimony, just like in Bowen, Judge. In  
22 Bowen, the plaintiff sought psychiatric counseling and  
23 medication, and the doctor's testimony was presented to the  
24 Court. I'll read it to you. [As read] This increase in  
25 stress from plaintiff's employment, it caused an exacerbation

1 of Mr. Bowen's symptoms of depression, i.e., concentration,  
2 insomnia, and helplessness. Due to his symptom exacerbation,  
3 Mr. Bowen's medication regimen was adjusted, and I  
4 recommended that he not go to work at the job with the  
5 Parking Authority beginning July 10, 2000, for an unspecified  
6 period of time.

7 Despite that, this court held no ground for an IME.  
8 The condition of showing that the plaintiff's mental  
9 health -- or mental condition was in controversy was not met.

10 And, again, the courts have over and over again  
11 said, claiming emotional distress, even severe emotional  
12 distress is not enough. You have to allege something that's  
13 unusually severe, or you have to allege a specific  
14 psychiatric condition. And as the courts have pointed out,  
15 if you don't follow that rule, then you're going to get a  
16 Rule 35 exam in basically every case where anybody alleges  
17 emotional distress damages.

18 And that's what courts have clearly indicated is  
19 not the correct result.

20 So, you know, I don't know what to tell you, Judge.  
21 The case law over and over again denies IMEs, notwithstanding  
22 the fact that the plaintiff sought psychiatric counseling and  
23 presented testimony from a treating physician as to that.

24 But, again, our representation to the Court -- and  
25 we don't care if it's embodied in Your Honor's order -- is

1 that we are not going to seek damages based on any  
2 psychiatric condition whatsoever. We are also stipulating we  
3 are not offering Dr. Acquaviva as expert testimony. He's  
4 simply a treating physician.

5 Now, as I said, I don't want to play hide the  
6 ball --

7 THE COURT: What's his reveal- -- what's his -- to  
8 what relevant subject is he going to testify at the trial  
9 about?

10 MR. DWYER: You blanked out a little bit. Did you  
11 say --

12 THE COURT: Yeah, what relevant -- what subject  
13 that's relevant to the case is Dr. Acquaviva going to testify  
14 to at trial?

15 MR. DWYER: Sure. About the plaintiff's emotional  
16 suffering and what she can be provided for that.

17 The plaintiff is allowed to allege that she  
18 suffering emotional distress.

19 THE COURT: Right.

20 MR. DWYER: She doesn't have to say that she got  
21 treatment for it. None of that warrants an IME. There's no  
22 case law that says that. Not the Third Circuit. Not the  
23 District of New Jersey. Nowhere.

24 That's the case.

25 THE COURT: Mr. Dwyer, one thing I want to

1 understand further. Is the plaintiff seeking -- will she be  
2 seeking damages for physical injury?

3 MR. DWYER: Yeah, for physical manifestations of  
4 the emotional distress. No different than if somebody said  
5 because I was upset about what happened to me, I was  
6 experiencing chest pains or I was having nightmares or I was  
7 having difficulty breathing or I was having difficulty  
8 sleeping. All those things are in the case law about  
9 insomnia, about, you know, physically upset about things.  
10 All that's in the case law. None of that entitled anybody to  
11 a Rule 35 exam.

12 I would like to address the second point, which, as  
13 I mentioned, Ms. Dohn didn't really address, which is the  
14 good cause requirement. Because there's a requirement, even  
15 if the plaintiff's mental condition is in controversy -- and  
16 I don't submit that it is. But even if it is, the defendant,  
17 not us, the defendant bears the burden of showing good cause.  
18 The party seeking the Rule 35 exam has the burden of showing  
19 good cause.

20 And as Conforti pointed out, even if the  
21 plaintiff's mental condition was in controversy in that case,  
22 there were in other tools available to the defendants to  
23 explore the plaintiff's allegations of emotional distress:  
24 The deposition of the plaintiff, the access to the  
25 plaintiff's medical records, depositions of plaintiff's

1 treatment providers.

2 All that has been available to the defendants in  
3 this case. The defendants deposed plaintiff on her emotional  
4 distress. They didn't do so very extensively, frankly, but  
5 that's not because of anything I did. I didn't prevent her  
6 from asking her those questions. And we went over the  
7 seven-hour limit, and I didn't stop the deposition until  
8 Ms. Dohn said she was done asking questions. She -- asked  
9 every question she wanted to ask. They've had access to  
10 thousands of pages of my client's medical records. They  
11 haven't been refused anything from us. Nothing. Everything  
12 in the world that they've asked for, however remotely related  
13 to my client's medical condition, they have those records.

14 And they have known about my client's treatment  
15 providers -- quite frankly, they've known about my client's  
16 treatment providers even before this case was reactivated in  
17 2020, because, remember, she made an application for  
18 disability pension in 2019 that includes 600 pages of medical  
19 records from various treatment providers. They had all those  
20 people -- they knew about all those people from the time this  
21 case was reactivated in August 2020. And they have never  
22 lifted a finger to depose a single one of those treatment  
23 providers.

24 That is not -- other options to gain this  
25 information.

1                   And by the way, if they want to depose one of those  
2 people now, notwithstanding the fact that fact discovery  
3 closed in November, I don't object to that. I don't care. I  
4 am not trying to prevent them from getting access to  
5 information. But they don't have good cause in this case,  
6 because there's no question about it that they have other  
7 means that they have not even explored in terms of getting  
8 discovery about my client's emotional distress damages.

9                   And then the -- you know, as I pointed out, case  
10 law says that when somebody's already had an IME, you have to  
11 show that their condition's changed. She had an IME just two  
12 years ago with their expert. Their expert --

13                   THE COURT: Their expert in another matter.

14                   MR. DWYER: Still their expert. And actually they  
15 testified in this case, Your Honor -- they submitted sworn  
16 declaration by Craig Bailey that from day one, Dr. Ghilain  
17 was going to be their expert. And, actually, they never  
18 disavowed using her as an expert either. But they have that  
19 IME, and they never presented --

20                   THE COURT: I don't know what the topic was of that  
21 IME. It was in a complete different proceeding.

22                   MR. DWYER: No, it's -- the topic included her  
23 emotional distress damages, absolutely. Dr. Ghilain  
24 subjected the client to the Minnesota Multiphasic Personality  
25 Inventory exam and opined about my client's emotional

1      distress damages and basically offered the opinion that she  
2      didn't believe my client really was suffering from any  
3      emotional distress or that she was exaggerating the symptoms  
4      of emotional distress, which is fine. You know, that's fine.

5              But she subjected to her an IME two years ago, and  
6      the defendants have offered no evidence that there's been any  
7      change in my client's condition since two years. So, again,  
8      that undermines the argument for good cause.

9              But, I mean, most basically, why don't they just  
10     take the depositions of her treatment providers? Why can't  
11     they get the information that way? They can. They're just  
12     refusing to do so.

13              I don't think --

14              THE COURT: Can I ask you something, something  
15     further -- and I also meant to ask Ms. Dohn.

16              So assuming that an IME is ordered, Rule 35, as you  
17     point out, does require the order -- to submit to a defense  
18     exam to "specify the time, place, manner, conditions and  
19     scope of the exam as well as the person or persons who will  
20     perform it."

21              So we know who the person is who is proposed to  
22     perform the exam. And I'm assuming, based on what I saw in  
23     the papers, the parties will be able to agree on a mutually  
24     convenient time and place.

25              So what is it that -- the plaintiff would like

1 further specification -- specificity with regards to the  
2 manner, conditions, and scope of the exam, if it takes place.

3 MR. DWYER: Sure, Judge. The cases that we cited  
4 on page 29 of our initial brief, the -- I'm probably  
5 mispronouncing it, but the Ornelas v. Southern Tire case and  
6 the Usher case and the Nicholas case all take the position  
7 that if there's going to be such an exam, under  
8 Rule 35(a)(2)(B), part of the requirement is specifying what  
9 tests are going to be administered. And so I agree with  
10 Your Honor that many of the procedural objections that we  
11 raised about sort of the unlimited scope of the exam and so  
12 forth and so on have been addressed by Ms. Dohn. She's  
13 agreed to hold the exam at a much more convenient and closer  
14 location for the plaintiff. She's agreed to have the exam  
15 recorded. She's agreed to have a nurse observer present.  
16 And she's agreed to limit the exam to approximately two  
17 hours.

18 We still would be entitled to know what tests are  
19 going to be administered.

20 THE COURT: Okay. So then that's --

21 MR. DWYER: -- that.

22 MS. DOHN: And, Your Honor, I am happy to speak to  
23 that. And --

24 THE COURT: Yeah, I was just going to ask you.

25 MS. DOHN: Yeah, absolutely. Thought it was

1 addressed, but maybe it wasn't. So Dr. Weiss is a  
2 psychiatrist. And so the examination will consist of a  
3 clinical interview. It's a typical mental status exam where  
4 you go over the developmental history, psychiatric history,  
5 family history, work history, and then to assess -- injuries  
6 plaintiff alleged emotional distress and explore any other  
7 causes of that emotional distress. He's not a psychologist,  
8 so there won't be tests that are being administered in the  
9 fashion that any kind of neuropsychologist or psychologist  
10 would do.

11 MR. DWYER: The only clarify -- obviously, Judge,  
12 I'm still very strongly opposing this exam, but the only  
13 clarification I want to seek from what Ms. Dohn just said is  
14 she said something about a mental status exam.

15 MS. DOHN: It's a -- sorry. Go ahead.

16 THE COURT: One at a time for the record.

17 MR. DWYER: Yeah, and so I am not exactly sure what  
18 that means. I will share with the Court that I was subjected  
19 to a cognitive exam by my neurologist just a couple of weeks  
20 ago. I didn't do too well. You know, that is a specific  
21 kind of test, you know, where they make you say -- I think  
22 it's President Trump said, "woman, man, person, camera, TV."

23 So if that's a test that's being administered,  
24 we're entitled to know that. If Ms. Dohn is just saying "No,  
25 no, no, no cognitive or anything like that. He's just going

1 to be asking her questions about her mental health and so  
2 forth and so on," then that's clarifying.

3 THE COURT: Ms. Dohn?

4 MS. DOHN: Yes, my understanding is there will  
5 no -- it won't be a mental status assessment as far as any  
6 kind of test that's administered. It will be a clinical  
7 interview.

8 THE COURT: Okay. All right.

9 Anything further from you, Mr. Dwyer? And then  
10 I'll give Ms. Dohn last words briefly.

11 MR. DWYER: Depending on how Your Honor rules, I  
12 may have something in connection with the ruling. But I'll  
13 have to wait and see how Your Honor rules.

14 THE COURT: Oh, okay. I am not going to -- I'm  
15 going to reserve decision. I'm going to write on this,  
16 because there's been, you know, if you take an appeal -- or  
17 if somebody takes an appeal, it's easier, I think, for Judge  
18 Neals to have it all laid out.

19 MR. DWYER: Okay.

20 THE COURT: Rather than reading a transcript.

21 MR. DWYER: Totally understand. So this would be  
22 my other issue, which I would raise with Your Honor, which is  
23 if Your Honor is going to overrule our objections and order  
24 the Rule 35 exam, we'll be taking an appeal to Judge Neals,  
25 and, therefore, I would be requesting a stay of the exam

1 until we're able to take the appeal. Obviously, we take the  
2 appeal with the time limitations set by the rules. So it's  
3 not like we just let it sit out there forever.

4 THE COURT: Right. If that's what I decide to do,  
5 then you -- I won't moot your appeal by requiring her to  
6 undergo the IME during the pendency.

7 All right. Anything further, Mr. Dwyer?

8 MR. DWYER: Oh, no, no. I thought Ms. Dohn was  
9 having the last word.

10 THE COURT: Okay.

11 Your turn, Ms. Dohn. Any rebuttal?

12 MS. DOHN: Your Honor, I'm just going to keep this  
13 very brief. Just, to knock it out, I think it's abundantly  
14 clear, but the defendants in this matter are three  
15 individually named defendants. They never retained  
16 Dr. Ghilain. They never conducted an IME. And so that has  
17 already actually been litigated in this case. So I don't  
18 think that argument holds any water.

19 THE COURT: Can you just remind me what Dr. Ghilain  
20 was sort of retained for and what proceeding and by whom?

21 MS. DOHN: Absolutely. Dr. Ghilain was retained to  
22 conduct an IME of the plaintiff as part of the disability  
23 requirement application that she submitted to the judiciary.  
24 That is the subject of a matter that's pending before Judge  
25 Hurd in Mercer County. The defendants, Judge Mizdol, Laura

1 Simoldoni, and Diana Moskal, are not parties to that action.  
2 There is no state entity involved in the action before  
3 Your Honor. That -- Dr. Ghilain was never retained in  
4 anticipation of this litigation. She was not -- she was not  
5 named as either a fact or an expert witness in this  
6 litigation. And the defendants in this matter are not privy  
7 to that IME report. That is completely and wholly unrelated  
8 to this matter.

9 So to the extent that any argument is made that she  
10 is -- that the plaintiff has undergone an IME for purposes of  
11 this litigation, it's just simply not true.

12 And what I wanted to speak very briefly about in  
13 Conforti and Bowen kind of the distinguishing factors is the  
14 court in Conforti specifically noted that plaintiff had not  
15 placed the depression anxiety in controversy within the  
16 meaning of Rule 35. Plaintiff has repeatedly reiterated that  
17 his damages will be limited to standard emotional distress,  
18 and plaintiff has represented that he will not introduce  
19 evidence that defendants' conduct caused or exacerbated any  
20 clinical conditions.

21 That's simply not the case here. And in Bowen,  
22 Your Honor, the plaintiff, Joseph Bowen had consistently  
23 represented to the Court that he intended to produce his  
24 treating physician, Dr. Patel, as a fact witness at trial to  
25 testify as to the mental condition in the summer of 2000.

1                   So, again, these are very fact-specific inquiries  
2 as to whether or not an IME should be ordered. And in that  
3 case, he was only going to be testifying, "he" being the  
4 treating physician, was always going to be offered as a fact  
5 witness at trial to offer testimony -- past work-related  
6 stress in order to explain why he did not return to work  
7 after June 2000.

8                   So, again, there were very limited and tight  
9 parameters and very significant clear representations that  
10 were made. And that's simply not the case here. There is an  
11 argument being made by plaintiff that she suffered emotional  
12 distress at the hands of these defendants that caused her to  
13 go to a treating physician who diagnosed with these maladies,  
14 and that as a result of this emotional distress attributed to  
15 these defendants manifested themselves in severe emotional  
16 distress so severe that it required surgical intervention.

17                  And, Your Honor, to the point where we had all this  
18 opportunity to depose the treating physicians, I think it's  
19 really important to remember the context and history of this  
20 specific case. And there was a very clear point in this case  
21 where we thought the matter might be dismissed because  
22 plaintiff would never appear for a deposition. She appeared  
23 for a deposition after several notices, after several court  
24 orders on October 13th. Just over two weeks after that is  
25 that when we served notice that we had retained an expert,

1 Dr. Weiss. So there has been no hiding the ball. There has  
2 been no dilatory conduct for the defendants. We have been  
3 moving forward on this case since day one. It was just not  
4 clear plaintiff was ever going to sit to be deposed.

5 So I think that's important for the context of this  
6 case.

7 And unless Your Honor has any questions, I don't  
8 have any further argument in rebuttal.

9 THE COURT: No. I don't.

10 Mr. Dwyer anything further?

11 MR. DWYER: I said I would let Ms. Dohn have the  
12 last word. And I'll --

13 (Simultaneous conversation)

14 THE COURT: Okay. No. It looked like you had  
15 something to say, and I'm a little bit --

16 (Simultaneous conversation)

17 THE COURT: -- about hearing what people have to  
18 say.

19 MR. DWYER: You know, I think Your Honor heard me,  
20 which is that all the arguments about procedural history of  
21 the case are neither here nor there, because I've already  
22 said to the Court point-blank that if the defendants want to  
23 depose Dr. Acquaviva or somebody else, I have no objection to  
24 that. So I am not trying to prevent people from getting  
25 discovery. I've never been trying to prevent people from

1 | getting discovery. But you --

2 | THE COURT: I understand.

3 | MR. DWYER: You heard me the first time.

4 | Your Honor --

5 | THE COURT: Okay.

6 | MR. DWYER: -- totally unrelated to this, I'm just  
7 | going to throw this out there whether or not Your Honor might  
8 | want to consider setting a date for another case management  
9 | conference in this case down the road, because regardless of  
10 | what happens, the parties are going to have to decide what to  
11 | do with whatever discovery is left. You know, I don't know  
12 | if the defendants, without an IME, still want to submit an  
13 | expert report, which is totally their right. And then, you  
14 | know, we ought to set a time for doing the pretrial order in  
15 | this case.

16 | THE COURT: Oh, certainly. Believe me, I'll follow  
17 | up at -- but, you know, we'll see what happens. We have to  
18 | conclude expert -- the expert phase of the case before  
19 | another date is really necessary. I guess after that, it  
20 | might be setting a motions schedule or, if the case is going  
21 | to go straight to trial, ordering a final pretrial order to  
22 | be prepared and that sort of thing.

23 | Don't worry, Mr. Dwyer. I'm very -- I'm diligent  
24 | in moving my cases along. Maybe a little too much so,  
25 | sometimes.

1                   MR. DWYER: Oh, no. I just wanted to throw that  
2 out there, Judge.

3                   THE COURT: Okay. There was one thing I wanted to  
4 raise. It's more than housekeeping.

5                   Look, we've discussed many times in this case that  
6 medical information of the plaintiff is being placed on the  
7 docket, on the public docket. And, you know, it's very  
8 personal information to be putting on the docket. And then  
9 as I was preparing for this hearing and reading all the  
10 motion papers, I even saw that there was a reference to the  
11 plaintiff's father's medical condition. And that's a  
12 complete third party.

13                  So I know that there's been a discovery  
14 confidentiality order in draft for a while. I'd urge you all  
15 to use it for the protection of your client's confidential  
16 information. I even looked at Federal Rule 5.2 and -- you  
17 know, which makes mandatory for the Court to redact certain  
18 information. This information doesn't fall within the scope  
19 of 5.2. But it's created some problems that the information  
20 is going on the docket. You know, Ms. Dohn, for example, had  
21 to send Dr. Acquaviva's records directly to my chambers. And  
22 it really should be filed under seal on the docket. That's  
23 the appropriate way to create a record.

24                  And, you know, we're sort of going back 20 years in  
25 time to have confidential things sent directly to chambers.

1                   So I just urge you to please follow through on  
2 that. It's an uncomfortable situation. Personal information  
3 on the Internet, the cases are legion how they can be misused  
4 by the public. And I don't want anything untoward to happen  
5 to anyone.

6                   MR. DWYER: So if I may address that, Your Honor,  
7 you know, I'm kind of a late arrival to this case --  
8 speaking, given it was filed in 2017, and I only entered  
9 appearance last summer.

10                  At some point after I entered an appearance,  
11 Ms. Dohn raised with me the issue of confidentiality order  
12 that apparently she had raised with prior counsel. And I  
13 said, you know, "Sure, could you send it to me." And she  
14 eventually did send it to me. And when I got it, I had some  
15 questions about it, some of which related to exactly how did  
16 she see this applying to information that had already been  
17 disclosed or obtained many months ago. I'm pretty sure that  
18 I sent her that email in November. And I have never heard  
19 back from her on it.

20                  So I have tried to keep that discussion moving  
21 along, but, you know, it takes two parties to have a  
22 discussion. I can't just talk --

23                  (Simultaneous conversation)

24                  THE COURT: Well, let me just -- rather than --  
25 I -- I am not looking for parties to blame one another or

1 anything. If you need my services in tailoring the discovery  
2 confidentiality order or, you know, helping resolve disputes  
3 about terms that you, you know, the parties can't agree on,  
4 I'm happy to do that.

5 My point is only that it's very unusual to have  
6 this level of medical information placed on the public docket  
7 for the world to see. And it's making me, frankly,  
8 uncomfortable.

9 MS. DOHN: Your Honor, your point is well-made. I  
10 sent the discovery confidentiality agreement twice. I'm  
11 happy to follow up with Mr. Dwyer, but I think all medical  
12 information clearly would have to be marked confidential, and  
13 we would happy treat it as such. We can --

14 (Simultaneous conversation)

15 THE COURT: I mean, a lot -- don't -- I am not  
16 going back retroactively and sealing. Once, as some judges  
17 have said, the cat is out of the bag and it's on the public  
18 docket, the genie does not go back into the bottle.

19 But I particularly became uncomfortable reading  
20 about third-parties' medical information that was just placed  
21 on the docket.

22 So please, please do something.

23 All right. Thank you. I am reserving decision. I  
24 will issue a written opinion as soon as I'm able to. I try  
25 to get to things expeditiously, but our workload right now is

1 crushing. So I can't make any promises as to exactly when.

2 Okay?

3 MR. DWYER: Thank you have a good weekend.

4 THE COURT: Thank you. You too.

5 (Conclusion of proceedings)

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|Hearing  
|17-cv-13111, January 21, 2022  
|Certification

36

11 I further certify that I am in no way related to any of  
12 the parties hereto nor am I in any way interested in the  
13 outcome hereof.

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18 | S/ *Sara L. Kern*

31st of January, 2022

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